

STATE OF MICHIGAN
COURT OF APPEALS

DEPARTMENT OF TREASURY,

Plaintiff-Appellee,

v

ROSA BRANNON,

Defendant-Appellant.

UNPUBLISHED

September 21, 2004

No. 247449

Wayne Circuit Court

LC No. 02-219899-CZ

DEPARTMENT OF TREASURY,

Plaintiff-Appellee,

v

SB & B TRANSPORTATION UNLIMITED,
INC.,

Defendant-Appellant.

No. 247630

Wayne Circuit Court

LC No. 02-219900-CZ

DEPARTMENT OF TREASURY,

Plaintiff-Appellee,

v

SIBERIA BRANNON,

Defendant-Appellant.

No. 248689

Wayne Circuit Court

LC No. 02-222263-CZ

DEPARTMENT OF TREASURY,

Plaintiff-Appellee,

v

No. 252085

Wayne Circuit Court

Defendant-Appellant.

Before: Cavanagh, P.J., and Smolenski and Owens, JJ.

PER CURIAM.

These consolidated appeals arise from tax assessments that plaintiff previously issued in order to recoup tax refunds wrongfully obtained by defendants. Defendants previously challenged the tax assessments, which were upheld by the Tax Tribunal, following which defendants unsuccessfully appealed the assessments to this Court and our Supreme Court. After the Supreme Court denied leave to appeal, plaintiff brought separate collection actions against each of the four defendants to collect the taxes owed. The four cases were assigned to different judges. In each case, the defendant raised the statute of limitations as an affirmative defense. Plaintiff moved for summary disposition on the grounds that each defendant failed to state a valid defense to the action, MCR 2.116(C)(9), and there was no genuine issue of material fact, MCR 2.116(C)(10). In each case, the judge granted plaintiff summary disposition and subsequently entered judgment in favor of plaintiff. Each defendant now appeals as of right. In Docket Nos. 247630 and 248689, we affirm the judgments for plaintiff. In Docket Nos. 247449 and 252085, we affirm the entry of judgment for plaintiff, but vacate the judgment amount and remand for modification of the amount of the judgment.

This Court reviews de novo a trial court's decision on summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Plaintiff moved for summary disposition under MCR 2.116(C)(9) and (10). One judge expressly granted plaintiff's motion under MCR 2.116(C)(9), but the other judges did not indicate under which subrule they were granting plaintiff's motions.

The standard for reviewing a motion under MCR 2.116(C)(9) is as follows:

When deciding a motion under MCR 2.116(C)(9), which tests the sufficiency of a defendant's pleadings, the trial court must accept as true all well-pleaded allegations and properly grants summary disposition where a defendant fails to plead a valid defense to a claim. *Village of Dimondale v Grable*, 240 Mich App 553, 564; 618 NW2d 23 (2000). [] Pleadings include only complaints, cross-claims, counterclaims, third-party complaints, answers to any of these, and replies to answers. *Id.* at 565; MCR 2.110(A). Summary disposition under MCR 2.116(C)(9) is proper when the defendant's pleadings are so clearly untenable that as a matter of law no factual development could possibly deny the plaintiff's right to recovery. *Alcona Co v Wolverine Environmental Production, Inc.*, 233 Mich App 238, 245-246; 590 NW2d 586 (1998). [*Slater v Ann Arbor Pub Schools Bd of Ed*, 250 Mich App 419, 425-426; 648 NW2d 205 (2002).]

A motion under MCR 2.116(C)(10) tests the factual support for a claim. The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties. Summary disposition should be granted if there is no genuine issue of

material fact and the moving party is entitled to judgment as a matter of law. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). We conclude that summary disposition was appropriate in all the cases under either of these subrules.

The parties do not dispute that plaintiff's collection actions are governed by a six-year statute of limitations. MCL 600.5813. But defendants argue that the respective trial courts erroneously found that the six-year limitation period was tolled during the period the tax assessments were being challenged administratively. While we agree with defendants that MCL 600.5856 does not indicate that the statute of limitations is tolled during an administrative appeal period, that statute does not provide the exclusive means for tolling the statute of limitations. In *Great Lakes Gas Transmission Co v Dep't of Treasury*, 140 Mich App 635, 649; 364 NW2d 773 (1985), this Court acknowledged that MCL 600.5856 does not permit tolling during an administrative appeal period, but recognized that prior lawsuits between the same parties involving the same cause of action will toll the running of the period of limitations.

Indeed, in defendants' prior appeal challenging the tax assessments, this Court held that defendants' administrative appeal of the tax assessments operated to toll the running of the applicable statute of limitations. Rejecting petitioners' argument the fraud penalty was improperly assessed after expiration of the statute of limitation period, the Court concluded that MCL 205.27a(3)¹ operated to suspend the running of the limitation period while petitioners administratively appealed the assessment. *Brannon v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued March 14, 1997 (Docket Nos. 184262, 186545-186554), slip op at 5.

Moreover, the statute of limitations was also tolled not only while defendants appealed the assessments to the Tax Tribunal, but also during their appeals to both this Court and our Supreme Court. MCL 205.22(4) and (5). An assessment is not final under MCL 205.22 until all appeals are exhausted. Because plaintiff could not proceed to collect the assessments until defendants exhausted their rights to appeal the assessments to the Tax Tribunal and this state's appellate courts, the statute of limitations was tolled until the Supreme Court denied defendants' application for leave to appeal on January 30, 1998. See also *Great Lakes Gas*, *supra* at 649-650. Accordingly, because plaintiff's collection actions are governed by a six-year statute of limitations, MCL 600.5813, which was tolled while defendants challenged the tax assessments, we hold that plaintiff's actions, commenced in 2002, were timely. The trial court did not err in granting plaintiff summary disposition in these consolidated cases.

Defendants Rosa Brannon and Troy Brannon argue that the judgment amounts entered by the trial courts are erroneous because they are inconsistent with the amounts assessed by the Tax Tribunal. In those cases, judgments were entered in the amounts listed by plaintiff in its Sworn Summary of Claims for each defendant. Plaintiff now concedes that the amounts listed were inaccurate. Plaintiff represents that the correct amount for Rosa Brannon is \$143,723.50, not \$232,432, the amount listed in the trial court's judgment. Similarly, plaintiff represents that the

¹ MCL 205.27a(3) provides that the statute of limitations period is tolled during the pending a final determination of the tax.

correct amount for Troy Brannon is \$58,247.16, not \$96,349.10, the amount listed in the trial court's judgment. Neither Rosa Brannon nor Troy Brannon have disputed these amounts. Accordingly, in Docket Nos. 247449 and 252085, the judgments against Rosa Brannon and Troy Brannon are vacated in part and we remand each of these cases for entry of a new judgment reflecting the revised judgment amount. The judgments against defendants in Docket Nos. 247630 and 248689 are affirmed.

Affirmed in part, vacated in part, and remanded for entry of the corrected judgment amounts in Docket Nos. 247449 and 252085. We do not retain jurisdiction.

/s/ Mark J. Cavanagh

/s/ Michael R. Smolenski

/s/ Donald S. Owens